In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-443

HARRAH INDEPENDENT SCHOOL DISTRICT,
L. M. SULLIVAN, EDWARD BROZOWSKI,
WALTER HELM, LOYD MIXON,
HAROLD MANWELL, JOE ZAWISKA,
and PAUL THOMAS,
Petitioners,

VERSUS

MARY JANE MARTIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1978

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In the
Supreme Court of the United States
OCTOBER TERM, 19__

No. .....

HARRAH INDEPENDENT SCHOOL DISTRICT, L. M. SULLIVAN, EDWARD BROZOWSKI, WALTER HELM, LOYD MIXON, HAROLD MANWELL, JOE ZAWISKA, and PAUL THOMAS,
Petitioners,

VERSUS

MARY JANE MARTIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Harrah Independent School District, L. M. Sullivan, Edward Brozowski, Walter Helm, Loyd Mixon, Harold Manwell, Joe Zawiska, and Paul Thomas, the petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered June 30, 1978.

OPINIONS BELOW

The opinions of the United States Circuit Court of Appeals for the Tenth Circuit and the United States District Court for the Western District of Oklahoma are printed in Appendix A.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Tenth Circuit was entered on June 30, 1978. The Petition for Rehearing was denied on August 8, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTION FOR REVIEW

Does the non-renewal of a tenured teacher's contract for failure to comply with a School Board's continuing education policy amount to arbitrary and capricious action or an unreasonable classification, when the teacher has been admittedly afforded proper procedural due process and given ample opportunity to comply with the policy?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution which provide " * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent was employed as a teacher by the Harrah Independent School District in the summer of 1969. At that time the rules and regulations of the School Board provided that teachers holding a Bachelor's Degree shall continue their education by earning five (5) semester hours every three (3) years (R. 136).

Upon entering the school system as a teacher, respondent was provided with a printed set of rules and regulations of the School Board which she read and understood (T. 5). However, from the time she was originally employed by the School Board until the school year 1975-76, respondent made absolutely no effort to comply with the rule requiring her to continue her education (R. 100-101).

During the summer of 1972, the Superintendent of the School District, Dr. L. M. Sullivan, personally advised respondent she was not in compliance with the continuing education rule. At that time respondent explained she had a swimming pool to pay for and was giving swimming instructions which would not allow sufficient time to comply (T. 51).

At this time it was the policy of the Harrah Board of Education to deny salary increments to any teacher in the District in non-compliance with the rule.

After the renewal of respondent's contract for the 1973-74 school year, the Oklahoma State Legislature mandated salary raises for all teachers in the State. Due to the mandated salary raises, the Board of Education could no

longer deny salary increments to any teacher in the District for not complying with the rule. Thus, the Board of Education amended its policies to provide for the penalty of non-renewal as opposed to denial of salary increments for failure to comply with the rule.

In August, 1973, Dr. Sullivan had a conference with respondent and advised her if she continued to fail to comply with the rule he would have no alternative but to recommend the non-renewal of her teaching contract to the School Board (T. 12, 52). At this time Dr. Sullivan told three (3) other teachers in non-compliance with the rule the same thing he told respondent (T. 53). The Superintendent's counseling sessions in August allowed the teachers to enroll in their required courses by the fall term commencing in September if they so desired.

Pursuant to Dr. Sullivan's recommendation at the September, 1973, School Board Meeting, respondent and the three (3) other teachers involved were notified by letter dated September 6, 1973, that in light of the Legislature's mandated salary raise, their failure to initiate compliance with the continuing education rule by April, 1974, would result in the recommendation of the non-renewal of their teaching contracts for the ensuing year because of neglect of duty in failing to adhere to Board policy (R. 7, 13, 53, 54, 131).

During the course of the school year 1973-74, respondent made absolutely no effort to comply with the rule. Indeed, she did not attempt enrollment for a single credit (T. 55). However, the three (3) other teachers in non-compliance (Janice Martin, Lorraine Bruce and Robert

Bruce) not only initiated compliance, but came into full compliance with the time allotted (T. 53).

Respondent never made an effort to discuss the letter of September 6, 1973, with the Superintendent or Board (T. 54). She did, however, appear at the January, 1974, School Board Meeting and openly and notoriously stated she had no intention of attempting compliance with the Board rule regarding continuing education (T. 55).

At the April, 1974, School Board Meeting Superintendent Dr. Sullivan made the recommendation to the Harrah Board of Education not to renew the teaching contract of respondent on the grounds of willful neglect of duty by virtue of her failure to comply with the Board's rule regarding continuing education, and the Board voted not to renew respondent's contract for the 1974-75 school year (T. 55).

In accordance with 70 O.S. 1971, § 6-122, respondent was issued notice in the form of a letter dated April 2, 1974, advising her teaching contract would not be renewed because of willful neglect of duty in failing to adhere to Board policy, and stating that she had the right to a hearing before the Board of Education (R. 130, T. 7, 56).

At this point it is critical to note that it was only necessary for the deficient teachers to be *enrolled* in a sufficient number of hours to comply with the rule. Dr. Sullivan explained his previous recommendation to the Board in September, 1973:

> "And I recommended that we write each of the teachers a letter, stipulating that they were in non-compliance and would be charged with willful neglect

of duty if they were not—if the deficiency hadn't been removed or they were not *enrolled* in a sufficient number of hours to complete the requirements." (T. 53, 54)

At the request of respondent a due process hearing was conducted on May 13, 1974, before the Board of Education pursuant to provisions of 70 O.S. 1971, § 6-122. The purpose of this hearing was two-fold. First, to grant the respondent a due process hearing as required by State law. Secondly, to grant respondent additional opportunity to enroll in a sufficient number of hours to comply with the regulation. The Superintendent's uncontroverted testimony specifically described the two-fold purpose of the hearing:

> "To grant Mary Jane additional opportunity to enroll in a sufficient number of hours to comply with the regulation, to give her a hearing." (App. I, P. 21, Pet. for Reh.)

Respondent and her attorney appeared at the hearing and were given the right to cross-examine witnesses. At the conclusion of the hearing the Board of Education upheld their earlier decision of non-renewal of respondent's teaching contract (R. 132, T. 14, 44, 56).

Pursuant to the provisions of 70 O.S. 1971, § 6-122, respondent appealed the decision of the Harrah Board of Education to the Professional Practices Commission, an administrative tribunal, which affirmed the decision of the Harrah Board of Education (T. 58). In fact, the Professional Practices Commission, in their findings of fact, like the Trial Court herein, found from the testimony of respondent herself that she had no intention of complying with the Board's requirement (R. 98).

Respondent initiated this action in the United States District Court for the Western District of Oklahoma under 42 U.S.C. § 1983 alleging that she had been denied equal protection under the laws and had been deprived of protected liberty and property interests without due process of law. At the conclusion of a complete evidentiary hearing respondent's Motion for a Preliminary Injunction was denied. The District Court's ruling on respondent's Motion for a Preliminary Injunction which discusses alleged "arbitrary and capricious" action is contained in Appendix A to this Petition. By stipulation the District Court decided the issue of liability on the basis of evidence presented at the hearing on the preliminary injunction. In its opinion it directed its attention to the issue as to whether respondent's non-renewal was based on an "impermissible reason that is prohibited by the Constitution."

As concerns the Equal Protection Clause, the District Court found that the continuing education requirement had a rational relation to the objectives of the School District, *i.e.*, the goal of increasing the competence of the faculty entrusted with the instruction of the children in the school system. Thus, the Court ruled that the continuing education rule was not an impermissible or irrational classification and that the Equal Protection Clause was not violated.

On the procedural due process issue, the District Court found that the notice and hearing requirements of 70 O.S. 1971, § 6-122 were fully complied with, and that respondent was afforded her full constitutional rights in this respect prior to the non-renewal of her teaching contract. As con-

cerns the substantive element of the due process clause, the District Court found the continuing education rule to be "rational," and that the respondent had "fair warning." Finding that respondent was "afforded her full constitutional rights," the Court entered judgment on behalf of the petitioners and dismissed her Complaint.

By Opinion dated June 30, 1978, the United States Court of Appeals for the Tenth Circuit reversed outright the judgment of the Trial Court and found that there was "no rational basis for the Board's action, whether viewed as an unreasonable classification or as arbitrary and capricious action." The Appeals Court agreed with the District Court that respondent had been afforded proper procedural due process, and that she had not been deprived of property *or* liberty. Justice McKay delivered the Opinion, and Justice McWilliams concurred in the result. The Opinion did not designate Chief Justice Seth's position.

Petition for Rehearing was denied on August 8, 1978. The Court of Appeals stayed the mandate until September 17, 1978, pending petitioners' application to this Court for a review on Writ of Certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals for the Tenth Circuit in the case at bar decided an important question of Federal law which has not been, but should be, settled by this Court. In reversing the United States District Court for the Western District of Oklahoma, the Tenth Circuit Court of Appeals ruled that the elements of substantive due process come into play notwithstanding the fact that property and liberty deprivations are nonexistent because procedural due process has been properly afforded. In substance, the Tenth Circuit's holding is in conflict with decisions of other Circuits on the same issue. In *Jeffries* v. *Turkey Run Consolidated School District*, 492 F.2d 1 (7th Cir. 1974), the Seventh Circuit held:

> "Certainly the constitutional right to 'substantive' due process is no greater than the right to procedural due process. Accordingly, the absence of any claim by the plaintiff that an interest in liberty or property has been impaired is a fatal defect in her substantive due process argument." 492 F.2d 4.

The dichotomy in the Tenth Circuit's ruling in the case at bar is further revealed in *Newcastle-Gunning Bedford Education Association* v. *Board of Education of the Newcastle-Gunning Bedford School District*, 421 F.Supp. 960 (Del. 1976):

> "Because 'the constitutional right to "substantive" due process is no greater than the right to procedural due process,' *Jeffries* v. *Turkey Run Consolidated School District*, 492 F.2d 1, 4 (C.A. 7, 1974) (Stevens, J.); *Weathers* v. *West Yuma County School Dist. R-J-1*, 530 F.2d 1335, 1340-42 (C.A. 10, 1976); *Evans* v.

Page, 516 F.2d 18, 21 (C.A. 8, 1975); *Morris* v. *Board of Education of Laurel Sch. Dist.*, supra, 401 F.Supp. at 213 n. 36; *Pavlow* v. *Martin*, 381 F.Supp. 707, 710 (D. Del. 1974), aff'd 515 F.2d 507 (C.A. 3, 1975); cf. *Mescia* v. *Berry*, 406 F.Supp. 1181, 1193-94 (D.S. Car. 1974), aff'd 530 F.2d 969 (C.A. 4, 1975), it follows from the Court's rejection of plaintiff's procedural due process claim that the plaintiffs' substantive due process rights have not been violated."

The cases referred to above involve situations where the Court has determined that the plaintiff is not entitled to procedural due process, and, therefore, cannot claim substantive due process rights have been violated. However, because the constitutional right to substantive due process is no greater than the right to procedural due process, it is submitted that respondent herein, who has been afforded procedural due process to protect her property and liberty interests, cannot prevail on substantive due process grounds which are necessarily intertwined with the procedural determination.

Indeed, the Tenth Circuit itself in *Weathers* v. *West Yuma County School Dist. R-J-1*, 530 F.2d 1355 (10th Cir., 1976), reveals that this Court left this very important issue open under *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972):

> "Following all the Supreme Court cases cited, the Court in *Roth* made direct pronouncements on the procedural due process required in a situation similar to the one before this Court. *Roth* has been properly interpreted as holding a statement of reasons is not required for procedural due process when a nontenured teacher is nonrenewed. *Frazier* v. *Curators of Univ. of*

> *Missouri*, 495 F.2d 1149 (8th Cir. 1974); *Jeffries* v. *Turkey Run Consol. School Dist.*, supra. If a school board is not required by procedural due process to give any reasons, we cannot see why a statement of reasons, if given, need be based upon substantial evidence. *Buhr* v. *Public School Dist. No. 38*, supra. *The Supreme Court gave no indication that substantive due process might not be complied with if procedural due process were complied with;* we will not, on the basis of statements in other contexts, import an additional independent due process requirement into the *Roth* situation. In the absence of a property or liberty interest, as defined in *Roth*, the trial court properly refused to consider the merits of appellant's claim of arbitrary and capricious action by the school board." (Emphasis added)

In a very true sense the Tenth Circuit's ruling on this issue is also in conflict with the applicable decisions of this Court, in light of this Court's contemporary reluctance to embrace the concept of substantive due process. The concept of substantive due process involving standards of "irrationality" and "arbitrariness" has had a long and tortuous history in the Federal Courts. As stated in *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973), this Court once expressly espoused the concept and actively employed it to strike down state action "which a majority of the Court deemed unwise," 414 U.S. at 164, 94 S.Ct. at 412. See *Coppage* v. *Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915); *Adair* v. *United States*, 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436 (1908); *Lochner* v. *New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). Applications of the concept of substantive due process, and the concept

itself, have generated serious criticisms of the judiciary and the judicial function. This Court itself has expressly repudiated the use of substantive due process as a vehicle for intervening in choices properly left within the discretion of State officials. *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, supra; *Ferguson* v. *Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); cf *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 53-55, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

Justice Holmes made the point well in commenting on substantive due process in his dissent in *Truax* v. *Corrigan*:

> "I must add one general consideration. There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect." 257 U.S. 312, 344, 42 S.Ct. 124, 134, 66 L.Ed. 254.

In the case at bar the Tenth Circuit Court of Appeals found "no rational basis for the Board's action, whether viewed as an unreasonable classification or as arbitrary and capricious action." In this respect the Tenth Circuit Court of Appeals also decided the equal protection question in a way in conflict with the applicable decisions of this Honorable Court.

Under the traditional standard, the classification challenged here must at a minimum bear some rational relationship to a legitimate State purpose. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172, 92 S.Ct. 1400, 31 L.Ed.2d 768. Moreover, the policy is presumed to be constitutional even if source materials normally resorted to for ascertaining its grounds are silent; and classifications will "be set aside only if no grounds can be conceived to justify them." See *McDonald* v. *Board of Election*, 394 U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739. In the case at bar the Tenth Circuit Court of Appeals did not accord the policy and classification the usual presumption of validity, and departed from this Court's rule that they may be set aside "only if no grounds can be conceived to justify them." The Tenth Circuit merely found "no apparent legitimate interest." The record and findings of the Trial Judge reveal numerous grounds to conceivably justify the action under *McDonald*, supra. The Trial Court specifically pointed out the most important State interest regarding the School Board's action:

> "The Court finds no impermissible or irrational classification in the provision requiring continuing education for teachers. It is without question a requirement that has a rational relation to the objectives of the defendant district, i.e., the goal of increasing the competence of the faculty entrusted with the instruction of the children in the school system."

Similarly, in its ruling on respondent's Application for Injunction, the Court found:

> " * * * There has been some evidence that it would be a problem to the school system, to the corp of teachers, to the administrators, if someone * * * who was nonrenewed on the basis of the asserted ground

> of willful noncompliance with policy, it would, perhaps, undermine the administration and the morale and * * *, perhaps, make it more difficult for teachers to take as seriously, or as seriously as they should, the responsibility to follow board policy for self-improvement in their field."

A rational basis for the Board's action regarding its continuing education policy flows from all portions of the record and the Trial Court's findings. The Tenth Circuit Court of Appeals clearly decided the Equal Protection Clause question in a manner in conflict with the applicable equal protection decisions of this Honorable Court.

An additional reason for granting this Writ of Certiorari is because the Tenth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Under Rule 52(a), Federal Rules of Civil Procedure, in a trial to the Court findings of fact shall not be set aside unless "clearly erroneous." After carefully listening to the witnesses, judging their credibility, and evaluating the evidence, the Trial Judge specifically found "no impermissible or irrational classification" as concerns the respondent herein. The Tenth Circuit Court of Appeals did not find the District Court's findings "clearly erroneous" for the simple reason they are not.

The present opinion in the case at bar is a drastic change in the law applied to Boards of Education and their employees, and presents far reaching implications. As was stated by Justice Stevens dissenting in *Shirck* v. *Thomas*, 447 F.2d 1025 (7th Cir., 1971):

> "Some years ago courageous and wise federal judges foresaw the potential harm that might flow from arbitrary actions by state government. On the assumption that the due process clause was more than a guarantee of fair procedure, they found a basis for substituting their views of sound policy for the 'arbitrary' decisions of state officials. Whether or not their policy judgments were correct, their expansive interpretation of the due process clause was fundamentally erroneous.
>
> "The analogy is apt because we have no guidelines other than the vague contours of the due process clause itself, and our own conceptions of appropriate policy, by which to judge the character of a school board's nonretention decision. In final analysis the 'due process' decision will not turn on any question of fair procedure but on a judge's evaluation of the substance of the administrative determination. I believe judges are qualified by experience and training to evaluate procedural fairness and to interpret and apply guidelines established by others; I do not believe they have any special competence to make the kind of policy judgment that this case implicitly authorizes. The assumption that they do invites the reaction that was produced by decisions such as *Lochner* v. *New York*, 198 U.S. 45, 56, 25 S.Ct. 539, 49 L.Ed. 937."

Justice Rehnquist recently acknowledged the dilemma in the majority Opinion in *Board of Curators, Univ. of Mo.* v. *Horowitz*, ... U.S. ....., 98 S.Ct. ....., 55 L.Ed.2d 124, 136:

> "Respondent urges that we remand the cause to the Court of Appeals for consideration of this additional claim. In this regard, a number of lower Courts have implied in dictum that academic dismissals from state institutions can be enjoined if 'shown to be clearly *arbitrary* or *capricious*.' *Mahavongsanan* v.

Hall, supra, 529 F.2d, at 449. See *Gaspar* v. *Bruton*, supra, 513 F.2d, at 850, and citations therein. *Even assuming that the Courts can review under such a standard* an academic decision of a public educational institution, we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case. Courts are particularly ill equipped to evaluate academic performance." (Emphasis added)

Justice Rehnquist further pointed out in *Horowitz*, supra:

> "But we have frequently emphasized that 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' * * * The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal."

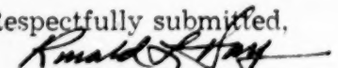
Indeed, respondent's non-renewal for failure to comply with the Board's continuing education rule was in essence for "academic" reasons, as was the case in *Horowitz*, supra. The Tenth Circuit Court of Appeals totally overlooked this fact, and as a result did not apply "far less stringent" requirements in the case at bar.

CONCLUSION

It is respectfully requested that the Supreme Court grant Certiorari in this case.

DATED this 7th day of September, 1978.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT was mailed on the 14th day of September, 1978, to the following by depositing same in the U. S. Mails, postage prepaid:

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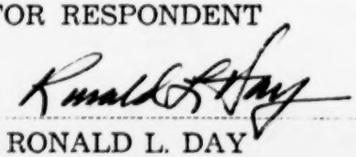

RONALD L. DAY

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
JUN 30 1978
HOWARD K. PHILLIPS
Clerk

MARY JANE MARTIN,	)	
	)	
Plaintiff-Appellant.	)	
vs.	)	
	)	No. 76-1813
HARRAH INDEPENDENT SCHOOL DISTRICT, L. M. SULLIVAN, EDWARD BROZOZOWSKI (*sic*), WALTER HELM, LOYD MIXON, HAROLD MANWELL, JOE ZAWISKA, and PAUL THOMAS,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. Civil No. 76-0045-T)

Robert Chanin, Washington, D. C. (Robert Weinberg and Jeremiah A. Collins of Bredhoff, Cushman, Gottesman & Cohen, Washington, D. C. and David Rubin, National Education Association, Washington, D.C. on briefs) for Plaintiff-Appellant.

Ronald L. Day of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma (Larry French of Edwards &

French, Seminole, Oklahoma, with him on the brief) for Defendants-Appellees.

Before SETH, Chief Judge, McWILLIAMS and McKAY, Circuit Judges.

McKAY, Circuit Judge.

Plaintiff was a tenured teacher. Oklahoma law required the defendant school board to renew her contract annually unless she was guilty of "immorality, wilful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government; or any reason involving moral turpitude." Okla. Stat., tit. 70, § 6-122 (Supp. 1973) (repealed 1977). That statute also provided for full scale hearing and appellate procedures in the event of nonrenewal. Plaintiff's contract incorporated by reference the rules and regulations of the board. Of relevance to this case was a regulation requiring continuing education in specified increments. The regulation allowed three years in which to complete the work. Both by the terms of the regulation itself and by the uninterrupted practice of the board, the only sanction for noncompliance with this requirement was the withholding of salary increments. This rule remained in effect throughout the dispute and litigation below.

Plaintiff, for a variety of reasons including her heavy involvement in the school's extracurricular programs, exercised her option to forgo salary increments during the 1972-1974 school years by not completing the specified additional credit hours of study. Her contract was renewed by defendant board without the increments. After the renewal of her contract for the 1973-1974 school year, the Oklahoma State Legislature mandated certain salary raises for teachers regardless of their compliance with the continuing education policy. Thus deprived of the only available sanction against four teachers, including plaintiff, who had been relying on their right to forgo salary increments, the board wrote to them on September 6, 1973, saying that unless they completed five semester hours by April 10, 1974, their contracts would not be renewed for 1974-1975. The reason given for the threatened nonrenewal was "gross neglect and failure to adhere to board policy." Oddly enough, the letter repeated the language of the regulation indicating that the penalty for continued noncompliance was denial of salary increments.

The board's letter implemented a special policy as to plaintiff and her three yokefellows under which they, unlike any other tenured teacher before or since, would be subject to discharge for failure to come into compliance with continuing education requirements within seven months (instead of three years). The only factor which distinguished this insular group from all other teachers, so far as the newly adopted policy of discharge for noncompliance was concerned, was the fact that they had lawfully relied on the board's prior policy of salary penalty only.

Plaintiff did not earn the five credits within the seven month period imposed on her.[1] She appeared before the board in January 1974 to protest the proposed special limitation and penalty and to indicate that under the circumstances she could not and would not comply. At the April 1974 meeting the board voted not to renew plaintiff's contract for the 1974-1975 school year. Plaintiff immediately commenced both an administrative appeal and an action in the Oklahoma State courts. She lost at the first level of her administrative appeal and did not pursue additional

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[1] Martin testified at trial that the Board's order that she earn five credits by the coming April amounted to an impossible burden: "I was coaching High School and I was gone two and sometimes four nights a week and I thought that was enough for my marriage to stand, at that particular time." Record, vol. 4, at 37.

steps available under Oklahoma administrative review laws.

The state trial court subsequently entered an order reinstating plaintiff and issued a writ of mandamus.[2] The Oklahoma Court of Appeals affirmed the issuance of the writ.[3] The Oklahoma Supreme Court did not reach the merits of the case, holding instead that the trial court was without jurisdiction to issue the writ of mandamus because plaintiff had failed to exhaust her administrative remedies. *Martin* v. *Harrah Independent School Dist.*, 543 P.2d 1370 (Okla. 1975). In a strongly worded dissent, three justices

[2] Martin v. Harrah Independent School Dist., No. CJ 74 1945 (Dist. Ct., Oklahoma County, July 15, 1974). The court's order of reinstatement was based on its finding that the nonrenewal "was done without authority of law and in violation of [plaintiff's] rights to due process under the law." *Id.*

[3] Martin v. Harrah Independent School Dist., No. 47,689, slip op. at 7-8 (Okla. Ct. App., May 13, 1975):

> [T]he regulation contains only one penalty provision, that "Salary increments will be denied for any teacher who does not meet this requirement." This was the penalty in effect at the time the parties entered into their contract and the only penalty approved by board in their rules and regulations throughout the adjudication of this case. . . .
>
> . . . [T]he question of whether the board imposed a proper penalty by virtue of its own lawfully enacted rules is controlling.
>
> A board should take cognizance of its rules in making decisions, Falvey v. Simms Oil Co., Tex. Civ. App., 92 S.W. 2d 292 (1936); the board should not merely recognize that violation of the rule by an employee exists and not give recognition to the remainder of the rule dealing with the penalty for such a violation. Thus the rules that the board passes binds them to compliance, People v. Gregory, 337 Ill. App. 661, 86 N.E. 2d 434 (1949). Appellee has a right to rely on these rules in considering her alternatives.
>
> Appellee here is a tenured teacher which under 70 O.S. 1971 § 6-122 entitles her to have her contract renewed unless proof of one of the statutorily enumerated causes for nonrenewal is shown. Here the board by its own rules provided that the penalty for noncompliance with the regulation would not be dismissal but merely monetary loss. The board should be held to its specification of penalty.

upheld the jurisdiction of the trial court and addressed the merits:

> "A teacher is a government employee and his interest in his continued employment is a protectible 'property interest' and therefore, any termination is subject to procedural and substantive safeguards. . . . Being fired for willful neglect of duty places a stigma on Mary Jane and this too could be an infringement of 'liberty and hence due process.'
>
> * * * * * * *
>
> ". . . Non-renewal provisions being penal in nature must give fair warning of the exact conduct which is outlawed. Rules must be reasonable. This is the essence of substantive due process. Otherwise, a school board could arbitrarily add new rules and new penalties to the regulations already existing at the time the teacher's contract was signed, and then use a teacher's failure to conform to these as a basis for termination and call it 'willful neglect of duty.' "

Id. at 1378 (Doolin, J., dissenting).

Because of the mandamus order of the Oklahoma trial court, plaintiff remained on the job until January 1975. By that time she had earned the required five academic credits and, in the eyes of the board, was in full compliance with the continuing education policy. After the Oklahoma Supreme Court decision, the parties attempted a settlement. When plaintiff refused the board's offer they voted to terminate her contract "pursuant to the decision of the Oklahoma Supreme Court."

Following her termination, plaintiff immediately filed this action in federal district court[4] alleging that she had

[4] Jurisdiction properly was based on 28 U.S.C. §§ 1331 and 1343. Plaintiff also alleged a cause of action under 42 U.S.C. § 1343 and asserted jurisdiction under 28 U.S.C. § 1332. The former section does not exist, and, since all parties were residents of Oklahoma, the latter assertion of diversity jurisdiction is groundless.

been denied equal protection under the laws and had been deprived of protected liberty and property interests without due process of law. Her motion for a preliminary injunction was denied and, by stipulation, the district court decided the issue of liability on the basis of evidence presented at the hearing on the preliminary injunction. The trial court properly declined to assert pendent jurisdiction over the non-Federal question of whether noncompliance with the continuing education policy amounted to "wilful neglect of duty" as contemplated by the Oklahoma statute. This question was clearly one of state law on which the Oklahoma courts had not spoken.

The only constitutional issue addressed by the district court was whether plaintiff's nonrenewal was based on an "impermissible reason that is prohibited by the Constitution." The court found no impermissible or irrational classification in the continuing education rule and therefore held there had been no denial of equal protection. While recognizing that plaintiff "was a tenured teacher and as such had a protected 'property' interest in continued employment," the trial court nevertheless concluded that by complying fully with the state procedural requirements relating to hearings in cases of contract nonrenewal, the board had satisfied the procedural due process requirements of the Fourteenth Amendment. As to plaintiff's claim that she was denied fair warning that her contract could be nonrenewed if she did not continue her education, the court held that "notice in the due process sense seems to intend notice of the proceedings against the plaintiff, not notice of all possible penalties that may be imposed for violation of certain rules and regulations." Finding that plaintiff was "afforded her full constitutional rights," the court entered judgment on behalf of the board and dismissed her complaint.

It is plaintiff's contention on appeal that the board's nonrenewal of her contract was a deprivation of property

and liberty without due process of law. That claim is bottomed on an arbitrary rule change which gave a small class of teachers, whose only sin was lawful reliance on the board's long-standing rules, only seven months to avoid the new sanction of contract nonrenewal while giving all others similarly situated three years in which to comply. We recognize that "it may be difficult, if not impossible, to give to the term 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as are forbidden." *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889). These terms "come to us from the law of England . . . and their requirement was there designed to secure the subject against the arbitrary action of the crown, and place him under the protection of the law." *Id.* "In this country the requirement is intended to have a similar effect . . . that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property." *Id.* at 124. In like manner, "[w]hen we consider the nature and the theory of our institutions of government . . . we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369-70 (1886). More recent decisions reiterate that the "essence" or "touchstone" of the Due Process Clause is protection of the individual from arbitrary government action. *See, e.g., Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974); *Slochower* v. *Board of Educ.*, 350 U.S. 551, 559 (1956); *Ohio Bell Tel. Co.* v. *Public Utils. Comm'n*, 301 U.S. 292, 302 (1937).

While protection from arbitrary government action is broadly guaranteed under the general, umbrella concept of "due process of law," modern opinions typically look to other more specific provisions of the Constitution for the meaning they read into this almost amorphous phrase. For example, courts have often utilized the Fourteenth Amendment to impose the same restrictions on state action as

were traditionally applied to federal action under the first eight amendments. *See, e.g., Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and cases cited. From the specific constitutional provisions mentioned in the Bill of Rights, opinions have also interpolated protection against impairment of "fundamental interests." *See, e.g., Carey* v. *Population Servs. Int'l*, 431 U.S. 678 (1977); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Roe* v. *Wade*, 410 U.S. 113 (1973).

In addition to the specific and penumbra due process guarantees of the Bill of Rights, the Equal Protection Clause of the Fourteenth Amendment has been recognized as providing more specific constitutional safeguards under the due process umbrella. For example, in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), the Court employed the Fifth Amendment Due Process Clause to strike down school segregation in the District of Columbia—just as it had used the Fourteenth Amendment Equal Protection Clause to invalidate similar state action in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), decided the same day. In so doing, the Court explained:

> [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

347 U.S. at 499. Since the Fifth and Fourteenth Amendments "require the same type of analysis," *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976); *see Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976), the Equal Protection Clause of the Fourteenth Amendment must be viewed merely as "a more explicit safeguard of prohibited unfairness" that is "additive" to the protection guaranteed by the Four-

teenth Amendment Due Process Clause. *See Hampton* v. *Mow Sun Wong*, 426 U.S. at 100 n. 17. It is, therefore, not surprising that in the same case some justices have employed an equal protection analysis while other justices have used a due process analysis to reach the same result under the Fourteenth Amendment. *E.g., Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974). Similarly, in *Thompson* v. *Gallagher*, 489 F.2d 443, 447 (5th Cir. 1973), the court observed:

> Thompson attacked the ordinance on both equal protection and due process grounds. In many cases, of which this is one, it makes little difference which clause of the Fourteenth Amendment is used to test the statute in question. Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L.Ed. 884 (1954). The question is whether the challenged statute is a rational means of advancing a valid state interest. A regulation not reasonably related to a valid government interest may not stand in the face of a due process attack. Likewise, a classification which serves no rational purpose or which arbitrarily divides citizens into different classes and treats them differently violates the equal protection clause.

Not only does the Court apply due process and equal protection analyses in similar situations but it also applies additional and subclass analysis. These approaches variously have been labeled substantive due process, procedural due process, old equal protection, new equal protection or newer equal protection. The rise, and at least partial demise, of the "irrebutable presumption" doctrine is one manifestation of various hybrid approaches to dealing with governmental unfairness. In *Hampton*, for example, the majority labeled its approach as equal protection. A dissenting opinion observed, however, that "while positing an equal protection problem, the Court does not rely on equal protection analysis. . . . The Court

instead inexplicably melds together the concepts of equal protection and procedural and substantive due process." 426 U.S. at 119 (Rehnquist, J., dissenting). In like manner, one commentator has called the "irrebutable presumption" technique the "New Old Equally Protective Substantively Procedural Due Process." *See* G. Gunther, Constitutional Law: Cases and Materials 893 n. 8 (1976).

Regardless of the label attached or type of analysis pursued, the Fourteenth Amendment affords not only a procedural guarantee against the deprivation of life, liberty, and property but also protects substantive aspects of these interests against unconstitutional restrictions by the states. *See Kelley* v. *Johnson*, 425 U.S. 238, 244 (1976). In each case the "essence" or "touchstone" of due process generally and equal protection specifically is protection of individuals from the arbitrary or unfair impact of government action. In each case the reviewing court must consider the constitutional importance of the affected individual interests, the character of the state action or classification in question and the state's asserted interests in support of its action or classification. As these factors vary from case to case, it is apparent that courts must of necessity apply a "spectrum of standards" in reviewing actions or classifications which allegedly violate the Due Process and Equal Protection Clauses.[5] We turn now to an

[5] This sliding-scale approach, initially articulated in connection with an equal protection analysis in Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting), was more fully developed in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting). Support for this approach is also found in Jiminez v. Weinberger, 417 U.S. 628 (1974) (Burger, C.J., majority); Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring); Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 172-75 (1972) (Powell, J., majority); Poe v. Ullman, 367 U.S. 497, 539-49 (1961) (Harlan, J., dissenting). In USDA v. Murry, 413 U.S. 508, 519 (1973), the author of the sliding-scale approach correctly observed that the irrebutable presumption approach "combines elements traditionally invoked in what are

examination of the importance of plaintiff's interests under the Constitution, the nature of the board's action in its decision not to renew plaintiff's contract and the asserted interests in support of the board's decision.

PLAINTIFF'S ALLEGED PROPERTY AND LIBERTY INTERESTS

The district court properly held that plaintiff's right to continued employment under her contract and Oklahoma tenure law was a property interest of constitutional importance. Property interests are not created by the Constitution, rather they are created and defined by state or federal statutes, local ordinances, and express or implied contract. *Bishop* v. *Wood*, 426 U.S. 341, 344-45 (1976); *Board of Regents* v. *Roth*, 408 U.S. 564, 576-78 (1972); *see Arnett* v. *Kennedy*, 416 U.S. 134, 163 (1974); *Perry* v. *Sinderman*, 408 U.S. 593, 599-603 (1972); *Weathers* v. *West Yuma County School Dist.*, 530 F.2d 1335 (10th Cir. 1976); *Abeyta* v. *Town of Taos*, 499 F.2d 323, 327 (10th Cir. 1974). Plaintiff's contract with the board was guaranteed renewable. Okla. Stat., tit. 70, § 6-122 (Supp. 1973) (repealed 1977). The statute constituted a promise of continued employment and was the kind of claim "upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents* v. *Roth*, 408 U.S. at 577. While not all property interests are protected by the Constitution, plaintiff's property interest as a tenured teacher is clearly in that class of interests for which the Court has recognized constitutional protection. *See Perry* v. *Sinderman*, 408 U.S. at 599-603; *Board of Regents* v. *Roth*, 408 U.S. at 576-78. We therefore agree with the trial

[5] (Continued)
usually treated as distinct classes of cases, involving due process and equal protection. But the elements of fairness should not be so rigidly cabined." We agree that "[t]here is no reason . . . to categorize inflexibly the rudiments of fairness." *Id.*

court's determination that plaintiff has asserted the deprivation of a property interest having constitutional dimensions.[6]

NATURE OF THE BOARD'S ACTION

In accordance with the board's prior admitted practices, a teacher's failure to comply with the continued education policy resulted in a denial of salary increments only. The board admitted that the imposition of the nonrenewal sanction was a change in its penalty for noncompliance. The record does not establish whether this substitution of penalty was peculiar to the insular group of four or was applied generally. We assume it applied to all teachers in the district, whether employed before or after the board gave notice of the new penalty. If nonrenewal were enforced against only plaintiff's insular group the board's action would be all the more objectionable.

The gravaman of the board's action was not the institution of a more severe penalty but the imposition of unequal time limitations within which teachers could avoid the penalty by compliance with the changed policy. By special letter, plaintiff's little group was ordered to acquire five academic credits within the following seven month period or face contract nonrenewal. In contrast, all other teachers had a three year period—as allowed by the unamended policies and guidelines of the board—in which to acquire five credits. The only distinction between plaintiff's small group and all other teachers is that they had previously exercised their undisputed option to forego salary increments rather than acquire the suggested five hours

[6] Plaintiff also asserted deprivation of a constitutionally protected liberty interest. Having found a protected property interest, the district court did not address this issue. Since the resolution of this question affects calculation of any damages, we hold that plaintiff's loss does not meet the test for a protected liberty interest. *See* Weathers v. Yuma County School Dist., 530 F.2d at 1338-40.

additional credit. Their prior choices on this question were clearly within the scope of their contracts and existing board policy. Thus, plaintiff's former lawful conduct was the only basis for the board's decision to treat her differently from other teachers.

ASSERTED STATE INTERESTS IN SUPPORT OF THE BOARD'S ACTION

Plaintiff does not challenge the validity of the continuing education policy itself. We therefore need not inquire whether the continuing education policy is legitimated by the apparent state interest in providing competent, well-trained, and prepared teachers for students enrolled in its public schools. We also are not called upon to decide whether enforcement of that policy, and hence, furtherance of the state interest, may be accomplished generally by either a denial of salary increments or contract nonrenewal. We are asked to determine only whether there is a valid state interest in support of the board's decision requiring plaintiff to come into compliance within seven months as a condition of continued employment, while allowing other teachers three years in which to comply. The asserted state interest for this decision was the board's concern that plaintiff not go unpunished for her previous choices not to acquire additional credits. In light of her prior retention as a teacher—despite her election not to continue her formal education—it is clear plaintiff suffered nonrenewal not because she failed to obtain five additional academic credits but because the board could no longer deny her salary increments.

DECISION

We hold that the board's decision not to renew plaintiff's contract was violative of the Fourteenth Amendment. As in *Thompson* v. *Gallagher*, 489 F.2d at 447, "it makes little difference which clause of the Fourteenth Amend-

ment is used to test the [action] in question." In balancing the constitutional importance of plaintiff's property interest against the asserted state interests, we conclude that there is no rational basis for the board's action, whether viewed as an unreasonable classification or as arbitrary and capricious action.

The only justification for the board's disparate treatment of plaintiff's insular group of four was its inability to continue denial of salary increments as the penalty for past noncompliance with the continuing education policy. As previously discussed, plaintiff's prior elections to forego salary increments as an alternative to acquiring additional credits was entirely lawful under her contract, Oklahoma statutes and the written policies and regulations of the board. Inasmuch as her prior lawful conduct was made the basis for this disparate punitive treatment, the board's policy changes resemble a bill of attainder or expost facto law, both of which are expressly prohibited by the Constitution because of their inherent unfairness. When her past lawful conduct is removed as a consideration, which indeed it must be, the board's action is without justification and is therefore arbitrary and capricious. Lacking a legitimate state interest in seeing that plaintiff is penalized by contract nonrenewal, the state has no apparent legitimate interest which could outweigh her constitutional interest in continued employment as a tenured teacher.

In summary, we believe plaintiff had a right to rely on the established board rules in considering her alternatives and that such reliance could not be arbitrarily undermined. Even if the requisite procedural due process notice and hearing requirements were strictly adhered to, the Fourteenth Amendment affords not only a procedural guarantee against deprivation of life, liberty, and property, but likewise protects substantive aspects of these interests. *Kelley* v. *Johnson*, 425 U.S. at 244. If this were not true, a government employer could unilaterally change its policies

or regulations at will, apply them in a discriminatory fashion and then provide nonrenewal as the penalty for failure to comply. The adequate notice and fair hearing required by procedural due process would have little meaning if, upon conclusion of the hearing, the government were free to ignore settled rules and understandings, disregard facts or otherwise act in an arbitrary and capricious manner. Whether the lack of a rational basis is found in the board's classification and disparate treatment or in its arbitrary departure from practices upon which plaintiff justifiably could rely, we are convinced that the action of the board violated Fourteenth Amendment notions of fairness embodied in the Due Process Clause generally and the Equal Protection Clause particularly.

We therefore reverse and remand to the district court for a determination of the appropriate remedy.

Judge McWilliams concurs in the result.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
MAY 25 1976
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
By ..... Deputy

MARY JANE MARTIN, Plaintiff)
) No. CIV-76-0045-T
HARRAH INDEPENDENT SCHOOL DISTRICT, L. M. SULLIVAN, EDWARD BROZOZOWSKI (*sic*), WALTER HELM, LOYD MIXON, HAROLD MANWELL, JOE ZAWISKA, and PAUL THOMAS, Defendants)

MEMORANDUM OPINION

Plaintiff herein, Mary Jane Martin, filed her complaint alleging that the defendants, the Harrah Independent School District (District) and the individual members of the Board of Education (Board) thereof, violated her constitutional rights when they refused to renew her teaching contract. Plaintiff alleged that her cause of action arose under Title 42 of the U. S. Code, sections 1343, 1983, and 1985, and that this Court has jurisdiction of the action under Title 28 of the United States Code, sections 1331, 1332, and 1343. Specifically plaintiff alleges that she was deprived of her "liberty" and "property" without due process of law because of the inadequacies of the notice and hearing provided her.

After a hearing for a preliminary injunction which was denied, the parties stipulated that all evidence necessary for the Court's determination of the liability question

was presented at that hearing, and they agreed that the Court should dispose of that issue by consideration of the record then before it. Pursuant to the stipulation, the following are the findings of fact and conclusions of law of the Court.

Plaintiff was employed by the defendant District in 1969 after signing a teaching contract which required compliance with all rules and regulations of the Board. One such regulation required teachers holding a bachelor degree to earn five semester hours every three years. While plaintiff was so employed she failed to earn a single credit.

In 1972 and 1973 plaintiff was personally informed by the superintendent of the District and defendant herein, L. M. Sullivan, that she was in noncompliance with the policy concerning continuing education. Plaintiff was then notified by letter dated September 6, 1973, that her further failure to comply would result in her being charged with wilful neglect of duty and the non-renewal of her teaching contract for the school year 1974-1975.

The 1973-1974 school year found plaintiff still in noncompliance, and after plaintiff appeared at a meeting of the Board in January, 1974, wherein she confirmed her decision not to comply with the continuing education provision, the Board in its spring meeting voted not to renew her contract by reason of wilful neglect of duty in failing to comply. In accordance with 70 O.S. 1971 § 6-122, plaintiff was notified of the Board's decision not to renew her contract and was advised of her right to a hearing before the Board.

Plaintiff requested a hearing, and in accordance therewith a hearing was conducted on May 13, 1974, at which time plaintiff and her attorney appeared. The Board upheld its decision of non-renewal at this hearing.

Plaintiff contends that her tenure was a property right which entitled her to procedural protections provided for

in the due process clause of the Fourteenth Amendment and that the actions of the defendants deprived her of the due process safeguards. Specifically plaintiff objects to the lack of notice of the penalty to be imposed, inasmuch as the rules and regulations containing the continuing education requirement did not mention non-renewal for its breach. Secondly, plaintiff argues that this particular violation of the rules and regulations cannot amount to "wilful neglect of duty" as contemplated in 70 O.S. 1971 § 6-122, and therefore the defendants improperly based their action on this statute. Plaintiff's complaint contained other allegations in support of her claim for damages and certain equitable relief, but inasmuch as plaintiff's proposed findings of fact and conclusions of law failed to include these, the Court considers these to have been abandoned as not meritorious.

In regard to the issue of whether or not the Board was correct in interpreting "wilful neglect of duty" to include said noncompliance, the Court is of the opinion it is not, and should not be, endowed with jurisdiction embracing this issue in this circumstance. This is a matter that is rightfully the concern of the officials of the school districts and state courts.

It is not within the province of the federal court to pass upon and decide the merits of all of the internal operative decisions of a school district. There must be some degree of harmonious cooperation in school administration to insure an efficient use of public funds and a reasonably satisfactory school program. School boards are representatives of the people, and should have wide latitude and discretion in the operation of the school district, including employment and rehiring practices. Local autonomy must be maintained to allow continued democratic control of education as a primary state function, subject only to clearly enunciated legal and constitutional restrictions. See *Freeman* v. *Gould Special School District of Lincoln*

County, Arkansas, 405 F.2d 1153 (8th Cir. 1969), cert. denied, 396 U.S. 843 (1969).

The only interest that this Court should have in the basis for non-renewal is to insure that it is not an impermissible reason that is prohibited by the Constitution of the United States.

One such impermissible classification was discussed in *Andrews* v. *Drew Municipal Separate School District*, 371 F.Supp. 27 (N.D. Miss. 1973), aff'd, 597 F.2d 611 (5th Cir. 1975). Here an otherwise qualified person was barred from employment merely because she had previously borne an illegitimate child. The Court in *Andrews* held that:

> "[T]he policy or practice of barring an otherwise qualified person from being employed, or considered for employment, in the public schools merely because of one's previously having had an illegitimate child has no rational relation to the objectives ostensibly sought to be achieved by the school officials and is fraught with invidious discrimination; thus, it is constitutionally defective under the traditional, and most lenient, standard of equal protection and violative of due process as well."

In the case at bar, the Court finds no impermissible or irrational classification in the provision requiring continuing education for teachers. It is without question a requirement that has a rational relation to the objectives of the defendant District, i.e., the goal of increasing the competence of the faculty entrusted with the instruction of the children in the school system. As further stated in *Andrews*, supra:

> "This court readily recognizes that public school officials have the undoubted authority to adopt reasonable employee qualification criteria. . . ."

Moreover, except as it applies to constitutional rights as discussed above, this Court does not have jurisdiction to decide the merits of the plaintiff's contention that the defendants were wrong in applying the language in section 6-122, "wilful neglect of duty," to the particular noncompliance involved here. The Court originally assumed jurisdiction of this case despite the plaintiff's failure to exhaust her administrative remedies on the state level because of the constitutional questions involved. *McNeese* v. *Board of Education*, 373 U.S. 668 (1963). However, the Court's intent was to determine only whether or not the plaintiff was deprived of equal protection of the law or due process, not the supplemental issue of state statute interpretation. As already discussed, the Court has found no equal protection violation. The Court is, of course, aware of the doctrine of "pendent jurisdiction" whereby a federal district court, in the exercise of jurisdiction over a federal law claim properly before it, may in its discretion proceed to extend jurisdiction over a related state law claim where both claims arise from a "common nucleus of operative facts." *Barnes* v. *Childs*, 63 F.R.D. 628 (N.D. Miss. 1974). The doctrine is discretional and the Court, for reasons already stated, prefers not to assume jurisdiction over what is basically a local concern which is best handled on the state level. See *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966), wherein it was held, in reference to pendent jurisdiction:

> "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right."

Thus, the Court will confine itself in the balance of this opinion to the only remaining question properly within the Court's province, being the issue of constitutional due process of law.

The Fourteenth Amendment requires that a person be afforded due process of law before he is deprived of "life, liberty or property." The guarantee of due process has been interpreted to be very broad and liberal, but generally it means that before a person's property is taken, he must be given notice and an opportunity to be heard.

The right to continued employment in certain instances has been interpreted to be an interest in "liberty" or a "property" interest, thus requiring due process guarantees before deprivation of same. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). The plaintiff herein was a tenured teacher and as such had a protected "property" interest in continued employment. Therefore, the Court must determine whether or not she had adequate notice and an opportunity to be heard before her employment was terminated.

In this regard it is the Court's decision that 70 O.S. 1971 § 6-122, which provides for notice and hearing in this type of matter, was fully complied with. Plaintiff does not assert that the statute itself is unconstitutional, and therefore the Court limits its determination to whether or not the defendants complied with section 6-122, which provides in part, to-wit:

> "The failure by the board of education to renew the contract of any teacher who has completed three (3) years shall not be effective, and the contract shall be renewed unless the board causes to be served on the teacher a written statement of the causes for such action, which must include one of the following: immorality, wilful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude. The teacher shall be afforded an opportunity to appear before the board and confront his accusers, having the right to cross-examine all witnesses and offer any evidence to refute the statements

and a reconsideration of the action theretofore made by the board. The burden of proof at this hearing shall be upon the administration of the school system to prove the statutory cause asserted by the administration.

Notice of non renewal and the statement of causes shall be mailed to the teacher prior to the 10th day of April."

On April 2, 1974, plaintiff received notice of the Board's decision not to renew her contract for the 1974-1975 school year. The notice contained a charge of wilful neglect and referred to other communications with the plaintiff which set out the specific reasons for finding wilful neglect—failure to comply with the continuing education requirement. The notice also advised the plaintiff of her right to a hearing before the Board.

Plaintiff requested a hearing, and one was afforded her on May 13, 1974, wherein she appeared with counsel. At that hearing plaintiff was given the opportunity to cross-examine her accusers and present whatever evidence she deemed proper.

It therefore appears to the Court that plaintiff was afforded her full constitutional rights before her employment contract was terminated, or more correctly, not renewed.

Plaintiff does argue that she never had notice of the penalty of non-renewal for noncompliance with the particular provision in question and thus was denied due process. However, notice in the due process sense seems to intend notice of the proceedings against the plaintiff, not notice of all possible penalties that may be imposed for a violation of certain rules and regulations. Plaintiff has cited no authority to the contrary, and the Court finds none. The Court is satisfied that plaintiff received all notice constitutionally required.

Accordingly, judgment is hereby granted on behalf of the defendants herein, and plaintiff's complaint is dismissed.

Dated this 25th day of May, 1976.

s/ Ralph G. Thompson
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON MAY 25, 1976

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MARY JANE MARTIN,	)	
	)	
Plaintiff,	)	
-VS-	)	No. C-76-0045-T
	)	
HARRAH INDEPENDENT SCHOOL DISTRICT, et al	)	
	)	
Defendants,	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD ON JANUARY 26, 1976

AN EXCERPT: THE COURT'S RULING

BEFORE THE HONORABLE RALPH G. THOMPSON, Judge Presiding

APPEARANCES:

Mr. Stephen V. Swanson, Attorney at Law, Oklahoma City, Oklahoma, appeared on behalf of the plaintiff.

Mr. Ronald L. Day, Attorney at Law, Oklahoma City, Oklahoma, and Mr. Larry L. French, Attorney at Law, Seminole, Oklahoma, appeared on behalf of the defendants.

(AN EXCERPT)

THE COURT: I have studied your briefs, read your authorities, found some on my own, and listened carefully to all of the testimony this afternoon.

It's my understanding of the law that for the granting of a Preliminary Injunction, such as has been applied for in this case, that four factors—at least three, and often times four—should be considered.

One is the probability of success on the merits, of the person asking for the injunctive relief.

Second is whether or not immediate and irreparable harm will be caused to the person seeking the injunctive relief if the application is denied.

Third: What the injury would be to the defendant in this type of action if the injunction is granted.

And sometimes, and in this case I think appropriate: The effect on the public; since we are dealing with a substantial number of school children and a school district.

The probability of success on the merits is the most difficult question to deal with, because a great deal of the testimony and evidence that we have heard and received in this proceedings will form the basis, ultimately, of the success or failure of the plaintiff's case when heard at trial.

There are very important and substantive questions involved in a case of this type; whether or not a constitutional right or rights have been violated, is always serious; whether an administrative decision is arbitrary or capricious; whether due process has been afforded or not. All of these several serious considerations come within the first matter to be considered, and that is: Probability of success.

I understand the law to say that if an administrative decision is arbitrary or capricious, it must be determined

by whether or not it was supported by evidence or whether it had reasonable justification; whether or not the plaintiff has demonstrated, to the extent of a reasonable probability, that the decision not to rehire was without evidentiary support, as in this case; the constitutional rights of a tenured teacher and whether or not those rights were afforded her; whether or not, in all of this testimony, and in all of the evidence that has been received, there is a showing that there were constitutionally protected rights involved, and if so, were they violated and thereby generating a federal cause of action, to begin with, and then, if so, a probability of success, in the second place.

In reviewing all of the evidence before the Court, I am not prepared to find that there is a probability of success of such strength that it meets the standards of the first consideration. I do not, in any way, pass judgment on the case on it's merits, except in that limited since (*sic*); that as of this time I cannot find that there is a probability of success, based on the law and the evidence, as I understand it, such as would warrant the issuance of a Preliminary Injunction.

Second, I do not find that there has been shown evidence of immediate and irreparable harm to this plaintiff if denied a Preliminary Injunction. I have heard her testimony, I have considered it carefully, and in the light of authorities that I have had available to me, and while I do understand that there is always harm and detriment to a plaintiff who has to wait for her possible ultimate reward in a lawsuit, I cannot find that in this case the evidence has been such as to show that her harm or detriment meets the standards required to warrant the granting of a Preliminary Injunction, primarily because should she prevail at the trial on the merits, monitary (*sic*) damages in the form of back pay or otherwise, and reinstatement, would be appropriate affirmative relief. On that basis, also,

I find that the Preliminary Injunction, as prayed, should not issue.

The other two factors are injury to the defendant, if the injunction is granted, and the effect on the public, and I think, having made the first two findings, I can dispose of those by saying that there has been some evidence that it would be a problem to the school system, to the corp of teachers, to the administrators, if someone who was discharged, or—or I strike that and correctly state—someone who was non-renewed on the basis of the asserted ground of willful noncompliance of policy, it would, perhaps, undermine the administration and the morale and then, perhaps, make it more difficult for teachers to take as seriously, or as seriously as they should, the responsibility to follow board policy for self-improvement in their field.

Finally, as to the effect on the public, it appears that while this is a very good teacher, with a good record, that substitutes and substitutions are inevitable in the teaching profession and the administration of schools, and that while there is a general problem, always, inherent in a substitution, that they are not problems that are new to the school administrators or the other teachers or the children, and they can be overcome and worked out, and apparently, in this case, they have been, to some extent. At least the effect on the public of denying this Preliminary Injunction does not seem to be particularly great.

For all of these reasons, and under the law as I understand it, the Preliminary Injunction, as requested, is denied, and the case will proceed toward the trial on the merits.

In that connection, the defendant's Motion to Dismiss is taken under advisement. The evidence and testimony that has been received in this proceeding will be considered in connection with that Motion to Dismiss.

The Plaintiff is granted to February 5, 1976, in which time to respond to the defendant's Motion to Dismiss, following which the Court will consider and rule on that Motion to Dismiss.

Is there any question or anything further to come before the Court at this time?

MR. DAY: No, sir.

MR. FRENCH: No.

MR. SWANSON: No.

THE COURT: Is the Order understood in all respects?

MR. DAY: Yes, Your Honor.

MR. FRENCH: Yes, sir.

MR. SWANSON: Yes.

THE COURT: Very well.

Court is in recess.

(PROCEEDINGS CLOSED)

A TRUE AND CORRECT
EXCERPT OF TRANSCRIPT
OF PROCEEDINGS

CERTIFIED: .....

Larry E. Marks
U. S. Court Reporter
Western District of Oklahoma

No. 78-443

IN THE

Supreme Court of the United States

October Term, 1978

HARRAH INDEPENDENT SCHOOL DISTRICT, L. M. SULLIVAN, EDWARD BROZOWSKI, WALTER HELM, LOYD MIXON, HAROLD MANWELL, JOE ZAWISKA, and PAUL THOMAS,

Petitioners,

v.

MARY JANE MARTIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF IN OPPOSITION

The petition in this case is misleading as to the issue of law determined by the court below and inaccurate in its description of the operative facts as found below. The decision below rests on two independent and well established legal grounds: first, that the due process clause of the Fourteenth Amendment is violated when a local government entity arbitrarily and capriciously deprives a citizen of a property interest, Pet. App. at 14; and second, that the equal protection clause of the Fourteenth Amendment is violated when a local government entity takes an action against a citizen based on a classification for which there is no

rational basis, *id.* These rules of law were applied by the court below to a particular set of facts which is unique and unlikely to recur. There is nothing about this case that makes it worthy of this Court's time and attention.

I. Due Process

A. Relying primarily on a quotation from the decision of the Seventh circuit in *Jeffries* v. *Turkey Run Consolidated School District,* 492 F.2d 1 (7th Cir. 1974), the petition argues that the court below could not properly have found a violation of due process absent a violation of procedural due process. However, the petition's quotation from *Turkey Run* is taken out of context: respondent here was a tenured teacher with a *property* interest in continued employment, Pet. App. at 11, whereas the claimant in *Turkey Run* had no property or liberty interest. The court in *Turkey Run* was careful to distinguish the protection afforded by the due process clause against arbitrary and capricious deprivations of a property or liberty interest, from the situation before it in which no property or liberty interest was implicated, *id.* at 4-5, and n. 12, 13, and 14.

Decisions of the Seventh Circuit, and of every other Circuit to consider the issue, since *Turkey Run,* have continued to adhere to both propositions embodied in the distinction stated in *Turkey Run*: the due process clause provides no protection to one who has neither a liberty nor property interest at stake; *but,* where such an interest is at stake, the right to due process protects that interest against arbitrary and capricious deprivation by the state.[1] In recognizing the

[1] *Stebbins* v. *Weaver,* 537 F.2d 939, 943 n. 2 (7th Cir. 1976); *Buhr* v. *Public School Dist.,* 509 F.2d 1196, 1203 (8th Cir. 1974); *McGhee* v. *Draper,* 564 F.2d 902, 912-13, n. 8a (10th Cir. 1977);

second of these propositions—the one applicable here—those decisions were doing no more than applying a rule of law well-established by this Court's decisions—as again, the court in *Turkey Run* expressly stated. *Id.*

The petition is simply wrong in suggesting that this Court has not decided the question whether the due process clause protects property or liberty against arbitrary and capricious deprivation by the state. This Court has stated that "the protection of the individual against arbitrary action . . . [is] the very essence of due process," *Slochower* v. *Board of Education,* 350 U.S. 551, 559 (1956), and has not hesitated to invalidate governmental action that arbitrarily deprived individuals of their property or liberty interests.[2] Indeed, the Court has viewed the procedural safeguards required by the due process clause as necessary to achieve the paramount aim of protecting against such arbitrary deprivations, *id, Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972).

B. The court below applied the rule of law just described to a set of facts which, because of its uniqueness, provides no opportunity for generalization—a set of facts which, incidentally, bears only slight resemblance to the facts as set forth in the petition.

Respondent, Mrs. Martin, was a *tenured* teacher employed for a number of years by petitioner Harrah Inde-

Sullivan v. *Brown,* 544 F.2d 279, 282 (6th Cir. 1976), *Weathers* v. *County School District,* 530 F.2d 1335, 1341, 1342 (10th Cir. 1976).

[2] *Slochower, supra; Wieman* v. *Updegraff,* 344 U.S. 183, 191-2 (1952); *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239 (1957); *Konigsburg* v. *State Bar,* 353 U.S. 252, 262, 273 (1957). *Cf. Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 898 (1961). *See generally, Turkey Run, supra,* 492 F.2d at 4-5.

pendent School District.[3] Pet. App. at 11, 4 n. 3, 6-7, 21. Both during and after Mrs. Martin's employment with the School District, the Board had the following policy: "Teachers holding a bachelors degree shall be required to earn five (5) semester hours every three years."[4] Prior to 1974, that policy was enforced by denying salary increments to teachers who had not complied with it. Pet. App. at 2. During that period, Mrs. Martin, "for a variety of reasons including her involvement in the school's extracurricular programs," *id.*, had voluntarily, and without disapproval from the School Board, chosen not to earn continuing education credits and thereby had foregone salary increments. In 1974, the State Legislature made salary increments mandatory. As a result, the Board sought to enforce its continuing education policy with a different sanction: non-renewal. Apart from this change in sanction, the continuing education policy of the School District remained otherwise the same, except as it applied to Mrs. Martin and three others who had similarly relied on the option to forego salary increments, *id.* at 2-3. Except for that "insular group of four," *id.* at 14, all teachers in the district, whether hired before or after the change in sanction, were given three years to achieve the five credits specified by the continuing education policy, *id.* at 2.

Mrs. Martin and the others of her "insular group of four," however, were subjected to "disparate treatment,"

[3] Under then applicable Oklahoma law, a tenured teacher was entitled to renewal absent " 'immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government; or any reason involving moral turpitude.' Okla. Stat., tit. 70, 6-122 (Supp. 1973) (repealed 1977), *id.* at 2." Pet. App. at 2.

[4] Record, Vol. III, ex. 2, p. 8; Pet. App. at 2-3, 12. "This rule remained in effect throughout the dispute and litigation below," *id.* at 2.

id. at 14. They were given seven months to "complete" the five credits that all other were given three years to complete, Pet. App. at 3, 7, 12-14.[5]

Mrs. Martin did not earn the credits "within the seven month period imposed on her." Pet. App. at 3. Consequently, the School Board voted at its April 1974 meeting not to renew her contract, *id.*, even though as Board President and petitioner Sullivan repeatedly testified, Mrs. Martin was "a good teacher" who did all that was asked of her and more. Record, vol. IV at 72; vol. II, ex. 4 at 45-6. As the court of appeals noted, Pet. App. at 3, n. 1, Mrs. Martin testified at trial that compliance within that short time would have "amounted to an impossible burden" because,

> I was coaching High School and I was gone sometimes four nights a week and I thought that was enough for my marriage to stand, at that particular time.

She did, however, obtain the five credits within less than three years of being informed of the necessity of doing so, *id.* at 5.

It was to these facts that the court of appeals applied the well recognized rule of law that a property interest may not be taken arbitrarily by the government. The conclusion of the court that the School Board's action was "arbitrary

[5] The assertion in the petition that Mrs. Martin merely had to enroll in courses by April 1974, rather than complete them, conflicts with the findings of the lower courts. Pet. App. at 3, 7, 12-14. These findings are supported by such evidence as Mrs. Martin's testimony that "I had from September to April" to comply, Record, vol. IV at 36, and the fact that the letter sent to her by the Board on September 6, 1973 spoke in terms of "correct[ing] the deficiency," not "enrollment." Record, vol. III, ex. 3. The petition merely refers to two statements made by President Sullivan (one of which is from a state court proceeding not on review here), regarding his personal views, not what he told Mrs. Martin.

and capricious'' is, with all this in mind, hardly surprising. But more important, that decision involves application of well-settled law to a unique situation that is unlikely to recur. The court of appeal's decision on this issue presents nothing worthy of plenary consideration by this Court.

II. Equal Protection

An independent basis for the lower court's decision was that ''there is no rational basis for the Board's action'' because it rested on ''an unreasonable classification.'' It is, of course, well-established that the state may not classify persons into distinct groups, with one group advantaged over another, unless the classification is rationally related to a permissible state object; where a classification does not have such a rational basis, it violates the equal protection clause of the Fourteenth Amendment.[6]

The court found no reasonable basis ''for the board's disparate treatment of plaintiff's insular group of four,'' and the Board has suggested none. The only justification asserted by the Board when it terminated Mrs. Martin's employment was its ''concern that plaintiff not go unpunished for her previous choices not to acquire additional credits,'' Pet. App. at 13, choices which, the court below observed, were entirely ''lawful,'' *id.* But her ''previous choice'' had already had the result prescribed by the School District policy: loss of her salary increments. The court found that the desire retroactively to apply the punishment of termination for her *previous* conduct was not a legitimate state objective. Pet. App. at 14.

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[6] *E.g., Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1971); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U.S. 150 (1897).

In its petition, the Board now suggests additional ''justifications'' for the classification it adopted. Pet. at 12-14. These new attempts at justification, however, do nothing more than support the rationality of the adoption of a compulsory continuing education program. But, as the court below made clear, the adoption of a consistently applied continuing education program is not the issue here. Pet. App. at 13. The issue is the permissibility of the classification by which Mrs. Martin and three other teachers were required to achieve in seven months the number of continuing education credits that all other teachers were given three years to achieve. The Board's asserted justifications offer no support for such differing time requirements.

As with the due process issue, the application by the court below of a well-established rule of law to the particular facts at issue here presents nothing worthy of this Court's plenary review.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

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